OFFICE OF THE CITY ATTORNEY
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July 5, 2001

Fair Political Practices Commission
428 J Street, Suite 450
Sacramento, CA 95814

Re: *In re Olson*, Draft Opinion, O-01-112

VIA FACSIMILE AND U.S. MAIL

Dear Members of the Commission:

This letter responds to the draft above-referenced opinion (the "draft opinion"). For the reasons discussed below and in our letter to you dated June 1, 2001, we urge your Commission not to issue an opinion in that form. Your Commission does not have the jurisdiction to issue the opinion. Even if the Commission has jurisdiction, the conclusion reached in the draft opinion is wrong.

The Commission's Lack of Jurisdiction

a. Government Code § 83104(a)

During the Commission's consideration of the staff report in this matter, the City of Los Angeles questioned whether the Commission has the authority to issue the opinion requested by the California Democratic Party and the California Republican Party. The City based its objection on Government Code § 83114(a), which says in relevant part that "[a]ny person may request the Commission to issue an opinion with respect to his duties under this title." This provision limits the authority of the Commission to issue opinions to those relating to the *duties* of the *person making* the opinion request with regard to *that person's* duties under *the Act.* It does not authorize the Commission to issue opinions about the City's duties under the Act at the request of the political parties, and it does not authorize the Commission to issue opinions about the parties' duties under the City's ordinances or the validity of those ordinances. Indeed, the Commission has "primary responsibility for the impartial, effective administration and implementation of" the Act (Government Code § 83111), and it is authorized to interpret the Act. However, the draft

opinion does not give guidance concerning the duties of the Democratic and Republican parties under the Act, and it does not simply interpret the Act. Rather, it determines that a City ordinance is invalid on the basis that it is preempted by provisions of the Act. Neither the Act nor any other legal authority authorizes the Commission to do so.

In order to overcome this dilemma, the draft opinion attempts to interpret the word "duties" in a way that is neither consistent with the common, grammatical understanding of the meaning of the word nor necessary to allow the Commission to carry out its responsibility to respond to requests for opinions. The word "duty" is defined by the AMERICAN COLLEGE DICTIONARY (1970 edition) as "1. that which one is bound to do by moral or legal obligation. . . ." *Id.* at 376. Construing the word as encompassing "obligations [under other laws] which the Act *excuses*" is not consistent with its commonly accepted meaning. Nor is that overly broad reading needed to permit the Commission to carry out its duty under the Act to issue opinions that tell people what their duties are under the Act.

b. California Constitution, art. III, § 3.5

Article III, § 3.5(a) of the California Constitution provides that a state administrative agency "has no power" to "declare a statute unenforceable . . . on the basis of it being unconstitutional unless an appellate court has made a determination that the statute is unconstitutional." The draft opinion (p. 5 fn 8) states that "a conclusion that section 85312 does not apply to the City of Los Angeles is effectively the same as a 'declaration' that the statute is unenforceable or unconstitutional." On that basis, the draft leaves the impression that the Commission believes that it is constrained to conclude that the City is preempted because to do otherwise would violate § 3.5.

First, concluding that neither § 85312 nor § 81009.5(b) preempts the City's two ordinances is not tantamount to a declaration that any provision of the Act is "unconstitutional." The Court in *Johnson v. Bradley* (1992) 4 Cal.4th 389 did not hold that the prohibition on public financing contained in Government Code § 85300 was unconstitutional, only that it did not preempt the City's matching funds program.

Secondly, if the Commission believes that Article III, § 3.5 interferes with its ability to conclude that the City's ordinances are not preempted, the appropriate course would be to simply not issue an opinion at all. That appears to be the lesson of *Regents of the University of California v. Public Employment Relations Board* (1983) 139 Cal.App.3d 1037 (*Regents*). That case involved a dispute over whether a labor union representing state employees could distribute organizational literature to employees, using the University's intercampus mail system. On the one hand, state law gave the union the right to use the mail system for that purpose. Government Code § 3568. On the other hand, federal law and postal regulations forbade that same use. Faced with that conflict,

and "[w]ith implicit reliance upon article III, section 3.5 of the California Constitution, the hearing officer as well as the PERB concluded that the latter was powerless to resolve the apparent conflict between the [state] HEERA provisions and the federal postal laws . . . ." *Regents*, *supra* at 1041. The court agreed "that the PERB properly declined to decide the question whether the claimed statutory right to use the internal mail system is unenforceable by reason of preemptive federal postal law. Unquestionably, that decision rests solely within the province of the judiciary." *Id.* at 1042. Likewise, the Commission can simply decline to decide the opinion request.

The City's Plenary Authority Over City Elections

In our letter to the Commission dated June 1, 2001, we discussed the plenary authority over the manner of electing municipal officers which the California Constitution gives to charter cities. Cal. Const., art. XI, § 5(b)(4). See pages 6-8 and 13-14 of that letter. As the Supreme Court stated in *Johnson*, *supra* at 398, the "'core' categories [listed in article XI, § 5(b)] . . . are, by definition, 'municipal affairs.'" As we stated in our letter, "if a subject falls within any one of those 'core' categories, it is automatically a municipal affair over which charter cities have exclusive authority without regard to whether the state may have a related statewide interest in the matter." See p. 14 of that letter. Although our letter did not argue that § 5(b)(4) governs the question presented by the political parties, it does suggest that § 5(b)(4) may well shield ordinances enacted pursuant to Charter § 313 (the Charter authorization for our matching funds program) from limitations imposed by the Political Reform Act.

The draft opinion incorrectly states that our earlier letter to the Commission "suggests that the City has 'plenary' authority in matters of municipal elections, by virtue of article XI, subdivision [5](b)(4)." Indeed, as § 5(b)(4) makes clear, Los Angeles as a charter city does have "plenary authority" over the manner of electing its officers. There can be no dispute regarding that issue. The issue which the Supreme Court did not decide in *Johnson* was whether the "manner" of electing city officers includes the City's laws governing its "matching funds" program:

> "Although we believe that charter section 313 clearly 'implicates' a municipal affair (see *CalFed*, *supra* 54 Cal.3d 1, 17), we need not, and do not, determine whether charter section 313 is by definition a 'core' municipal affair under article XI, section 5, subsection (b)(4), because we conclude that in any event, the charter section is enforceable as a municipal affair under article XI, section 5, subdivision (a) . . . ." *Johnson*, *supra* at 403-404.

Thus, the *Johnson* Court expressly did not reach the issue and certainly did *not* "reject[ ] precisely this "expansive" view when the City advanced it in that case." Draft Opinion at 8 fn 9. The Court's statement that is was "hesitant" to "embrace the expansive view" of § 5(b)(4) which we advanced in *Johnson*, it certainly did not "reject" that view.[1] Based on *Makey v. Thiel* (1968) 262 Cal.App.2d 362 and the *Johnson* Court's treatment of that case (*Johnson*, *supra* at 401-403), a good argument can be made that, if squarely faced with the need to decide the issue, the Court might well ascribe to the City's argument that its matching funds program is part of the "manner" of electing City officers. In any event, that would be a court's decision to make and not the Commission's.

Thank you for your attention to this matter. I plan to be at the Commission meeting on July 9, 2001, when it considers the draft opinion.

Very truly yours,

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[1] Indeed, the Court stated that the City asserted that view "with some force." *Id.* at 403. It is worth noting that the Court also stated that it was "reluctant to endorse the narrow scope of the word 'manner' advocated by petitioners." *Id.*